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IN THE

Supreme Court of the United States

October Term, 1960

No. 446

THE TANK STEAMER FORT FETTERMAN, Libellee, and CHAS. KURZ & CO., INC., Cross-Libellant,

Petitioners,

versus

THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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2. The legal authority for the structure is found in

Act of State of South Carolina, approved February 14th, 1913

Act of

copy herewith, certified by the Secretary of State under seal

State of South Carolina, approved March 25th, 1915

found in Vol. 29, page 249, of the statutes of that State.

3. Plans of the proposed structure are herewith, as follows, in quadruplicate:

(a) A map showing the proposed location, and the waterway for the distance of 1 mile above and below, with the data in regard to low and high water, direction and strength of currents, soundings, existing bridges in the vicinity, etc., necessary to enable the Chief of Engineers and the Secretary of War to determine whether the location is a proper one.

(b) Plan of the bridge showing the length and height of spans, width of draw openings, position of piers, abutments, fenders, etc., and those features which affect navigation, giving on both horizontal sections and elevations the outside structure lines separating the area left for navigation from the area occupied by the bridge, and, in figures, the least clear width of openings at right angles to the axes of the channel, and the least clear heights with reference to high water, ordinary boating water, and low water.

*(c) The essential features of the draw in two positions, closed and fully open.

4. The identity of the applicant is established by the following papers herewith:

A certified extract from the proceeding of Sanitary & Drainage Commission of Charleston County and copies of acts of Legislature referred to above with reference to the construction of the bridge.

5. Remarks: The Ashley River lies wholly within the State of South Carolina

Chairman, Sanitary & Drainage Commission of Charleston County

* Note: The applicant [illegible]

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THE SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, Libellant and Cross-Respondent,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE CASE AND THE QUESTIONS INVOLVED.

A. THE CASE

This suit in admiralty arose out of a collision which occurred in perfect visibility at about 9:30 on the morning of October 5th, 1955, when the negligently operated T-2 Tanker FORT FETTERMAN ran into and destroyed the raised western bascule arm of the drawbridge spanning the Ashley River in Charleston Harbor. More than usual interest attached to the collision by reason of the on-the-scene action photographs of the collision, which were taken by a news cameraman sent out to witness the passage of this large tank steamer through the open drawbridge. The four pictures,

which were snapped from an open small boat following the vessel, appear as exhibits in the Petition for Certiorari.

The litigation on the merits has been long protracted,[1] since the Respondent's right to recover was challenged on the ground that it was guilty of one or more statutory faults in the operation of the drawbridge. Efforts to delay the trial were also made by the Petitioner.[2]

Twice has an experienced trial judge, sitting by designation in the District Court for the Eastern District of South Carolina, resolved the merits of the controversy against the moving vessel.

These findings have now been affirmed in toto by the Court of Appeals for the Fourth Circuit in its unanimous opinion rendered May 19, 1960 (278 F. 2d 921, 1960 A.M.C. 1325).

The purpose of certiorari is not to provide for review of facts, but the questions which the Petitioner seeks to have the Supreme Court review are questions of fact, pure and simple, and the case does not now and never has involved any special or important reasons for review by this Court.

In the case of *McAllister v. United States*[3] the Supreme Court decided that:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not

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[1] 155 F. Supp. 339, 1958 A.M.C. 1735; 261 F. 2d 563, 1959 A.M.C. 1; 268 F. 2d 27, 1959 A.M.C. 1342 (Remand following rehearing); 177 F. Supp. 177 F. Supp. 76, 1959 A.M.C. 2403; 278 F. 2d 921, 1960 A.M.C. 1325.

[2] Petitioner's efforts to stay the trial were unsuccessful throughout: 148 F. Supp. 620, 1958 A.M.C. 1729; aff'd, 242 F. 2d 799, 1957 A.M.C. 1001; cert. den. 355 U.S. 826, 2 L. Ed. 2d 40, 78 S. Ct. 35.

[3] 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20; modification denied, 348 U. S. 957, 75 S. Ct. 447, 99 L. Ed. 748 (1954).

set aside the judgment below unless it is clearly erroneous."

This ruling has met with universal and perhaps grateful acceptance by the Courts of Appeal.[4] Therefore, had the District Court decided in favor of the Petitioner, and had the Court of Appeals reversed, some reason for the filing of this application for certiorari might exist. But in this case, the findings of fact by the District Court against the Petitioner have been affirmed by the Court of Appeals in all instances. Therefore, what the Petitioner really seeks, is to impose upon this Court the extraordinary burden of again reviewing a complicated set of facts which have been the subject of oral argument before the Court of Appeals on no less than four occasions.

To disguise this transparent attempt to persuade this Court to review and decide questions of fact, the Petitioner pretends that the harsh rule of the *Pennsylvania*[5] has been misapplied. This anachronistic rule, prevailing only in admiralty, which requires one guilty of a statutory fault to prove not only that the fault did not participate in the proximate cause of the collision, but that the fault could not, with *reasonable*

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[4]Lyon v. U.S.A., 265 F. 2d 219, 2 C.A. 1959; Armour & Co. v. Compania Argentina, 263 F. 2d 323, 2 C.A. 1959; Gorska v. Penna. R.R. Co., 262 F. 2d 198, 2 C.A. 1959; Nonsuco v. Gulfport, 262 F. 2d 349, 2 C.A. 1958; Raybourne v. Gulf Atlantic, 276 F. 2d 90, 92, 4 C.A. 1960; Gosnell v. U.S.A., 262 F. 2d 559, 4 C.A. 1959; Spanos v. The Lily, 261 F. 2d 214, 4 C.A. 1958; National Airlines v. Stiles, 268 F. 2d 400, 406, 5 C.A. 1959; O/Y Finlayson-Forssa A/B v. Pan Atlantic SS Corp., 269 F. 2d 11, 13, 5 C.A. 1958; Bloomquist v. McCarthy SS Co., 263 F. 2d. 590, 7 C.A. 1959; Clinton v. Joshua Hendy Corp., 264, F. 2d 329, 9 C.A. 1959; Albania Engine & Machine Works, Inc. v. American Mail Line, 263 F. 2d 311, 314, C.A. 1949; Marshall v. Westfal-Larsen, 259 F. 2d 575, 9 C.A. 1958.

[5]The Pennsylvania v. Troop, 19 Wall. 125, 86 U.S. 125, 22 L. Ed. 148 (1874).

possibility, have been a factor in the collision, was not applied by the Trial Court in the thirteen day original trial. It was partially because of the failure of the Trial Court to apply the rule specifically and in haec verba that the case was sent back for a second trial.[6]

Not satisfied with its success in imposing this harsh burden upon the Respondent, in the second trial the Petitioner went further, and unsuccessfully sought to convert the Pennsylvania Rule from a rule of evidentiary presumption, to a rule of absolute liability, an attempt which the Petitioner repeats in its Petition for Certiorari.

Petitioner's querulous claim of "injustice" in the conclusion of its Petition for Certiorari reminds Respondent of an example of despotic Turkish "justice" mentioned in one of the early South Carolina Reports. In the 1817 Preface to the first volume of the South Carolina Equity Reports (20 S. C. Reports, DeSauss. Eq.) Chancellor Henry W. DeSaussure told of the consequences of the accidental wrecking of a Turkish frigate on the island of Samos: The Turkish Pasha insisted that the people of Samos should pay for the frigate and the loss of her crew, "because the accident would not have happened unless their island had been in the way."

B. QUESTIONS INVOLVED: STATUTORY FAULTS CLAIMED BY PETITIONER.

In the final analysis there remained for consideration by the Court of Appeals the effect of but one statutory fault on the part of the Respondent. The Respondent conceded from the beginning and throughout all trials that the War Department Permit required the bascule arms to be raised to an angle of opening of approximately 80°. Hower, in spite of

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[6] 268 F. 2d 27, 1959 A.M.C. 1342.

that requirement, and almost since its completion nearly thirty-years earlier, the bridge did not customarily open to the 90° angle, but opened to an angle between 71° and 74°. On the occasion of the collision, it had been opened to a 71° angle. On the first trial the Respondent successfully established that its failure to open the bascule beyond the 71° *did not* contribute to the collision and the resulting damages.

It has always been agreed that if the FORT FETTERMAN had not been negligently rammed into the bridge, as it was in this case, but had been properly controlled so as to pass straight through the draw opening, exactly parallel to and a hair's breadth away from the western fender system, the uppermost tip of her superstructure would have contacted the bascule at 71° elevation, but the Petitioner's own expert witness, Grushsky, conceded that in this hypothetical situation the damages resulting "would be relatively light" to both ship and bascule (Appellee's Appendix No. 7604, pages 402-403). However, as will be hereinafter pointed out (See II, H(2), the Pennsylvania Rule of statutory fault is not applied to such an imaginary and nonnegligent approach of the vessel: it should be and is applied to the actual proven negligent and unseamanlike approach which the vessel did in fact make. It was under such an application of the Pennsylvania Rule that the two Courts below found Respondent had met and overcome the burden thereof.

In the first trial, the Petitioner advanced the contention that there had been a second statutory fault in the form of a delay in opening the bridge. The conflict in evidence on this point was resolved against the Petitioner by the Trial Judge and affirmed on the first appeal on the merits. Yet this delay in opening finds itself again presented as Point Number 4 on page 56 of the Petition for Certiorari!

An alleged third statutory fault—the position of the gear

rack used to lift and lower the bascule—made its appearance in the litigation after the first trial and in the first appeal on the merits to the Court of Appeals under the circumstances now related.

The factual theory of the Respondent as to the immediate cause of the destruction of the bascule, which was proven and accepted by the Trial and Appellate Court, is as follows:

The FORT FETTERMAN was making an improper crab-like approach at full speed ahead from leeward, and despite a hard right rudder, was kept on the leeward shore by adverse conditions of wind and tide. As observed by the District Judge, "it was to all intents and purposes out of control" when it smashed into the bridge[7]. The many million foot-pounds of force exerted by the FORT FETTERMAN, then moving rapidly under a full speed ahead bell, jammed the fender piling back against the concrete abutment, and permitted the hull of the vessel to destroy the gear rack.

The District Court agreed with this theory, describing the effect of the blow as follows:[8]

> "The blow of the hull of the ship against the gear rack on the downstream girder twisted that girder and its lower flange out of the plane in which they were designed to bear weight and stress so that the compression on the flange was lost and the natural force of gravity caused the downstream side of the bascule immediately to droop, sag and fall from its 71° elevation, before the vessel's fashion plate and forward superstructure had entered the draw opening. During that time the vessel, still under forward momentum, rebounded, glanced off or sprung away to her right from the abutment and

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[7] 177 F. Supp. 76, at 82.

[8] 155 F. Supp. 359, at 366.

fenders so that in the few seconds that it took for her fashion plate and superstructure to progress forward to a point opposite the downstream girder; she was no longer in contact with the fender system and was back in the clear opening between fenders. During these same few seconds, the downstream girder fell several degrees, so that it dropped on or directly in the path of the vessel's fashion plate and superstructure."

The gear rack was some *42 inches behind the fender system*, and thus *42 inches outside of and shoreward of the navigational fairway* set apart for water borne traffic.

In its first decree, the Trial Court assumed that the so-called protrusion of the gear racks from the face of the concrete abutment was not a violation of the permit, since it was located outside of the navigational fairway.

Nowhere in the record of the first trial does there appear any challenge on the part of the Petitioner to this assumption. Its contention was that no substantial contact had occurred between the vessel and the gear rack; that a satisfactory approach had been made, but that the collision resulted from an unexplained "sudden sheer."

In its appeal from the District Court's decree, the Petitioner advanced the theory that the gear rack was improperly located. The Petitioner was first successful in persuading the Court of Appeals that since the existence of the gear rack did not appear on the miniature sketch plan of the proposed bridge, accompanying the permit application, it was a violation of the permit.[9] On rehearing, the Court of Appeals modified its finding that the gear rack violated the permit, but sent the case back for re-trial to determine the legality of the position of the gear rack as a question of fact.

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[9]261 F. 2d 563, at 567.

On remand, the District Court found, on the basis of substantial testimony, that the location of the gear rack in relation to the concrete pier supporting the bascule was not violative of the permit. This finding was affirmed on appeal, which thus left for consideration at the Trial and Appellate level, as the sole statutory fault of which the Petitioner was guilty, the effect of the Respondent's failure to raise the bascule to the angle of approximately 80° as required by the permit.

At the remanded trial, the District Court found, on the basis of the reasoning set forth in its opinion, that:

> "The fact that the bridge was elevated to 71° instead of 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would have been sustained whether the bridge had been elevated 61°, 71°, 80°, or 82°."

Thus, did the District Court apply the Pennsylvania Rule in the manner directed by the Court of Appeals.

This finding was affirmed upon appeal in the opinion rendered on May 19, 1960.

While the Petitioner has repeatedly contended that the Respondent had failed to provide adequate fenders, this contention was never sustained at any level, Trial or Appellate; nothing on the War Department permit prescribes the quality or quantity of the bridge fender system.

II. ARGUMENT

The Petition before this Court is replete with inaccurate statements of the facts. Unproven factual theories, rejected at both the Trial and Appellate level, are set forth in the Petition in such a manner that a casual reader would assume

they were admitted facts in the case. For this reason, it is necessary to review the facts in order that no misunderstanding can exist. In doing so, we will pinpoint the substantial and credible evidence upon which the findings of both the District Court and the Court of Appeals are based, much of which is ignored by the Petitioner in the Petition presented to this Court. This review necessitates (A) a factual presentation as to the physical layout of the Ashley River Bridge and (B) a summary of relevant events leading up to the collision, and will include argument designed to demonstrate that substantial and credible facts support the findings and affirmances by the Trial and Appellate Courts. respectively, and that the existence of such evidence in the record cannot leave this Court in review with the definite and firm conviction that any mistakes have been committed below:

(C) Eye witnesses and expert testimony from qualified and competent persons establish that the FORT FETTERMAN was managed in a negligent and unseamanlike manner on her approach to and passage through the drawbridge.

(D) Voluminous testimony of numerous eye witnesses—many of them trained naval personnel familiar with the area in question—establishes that there was no delay in opening the drawbridge for the passage of the FORT FETTERMAN.

(E) Competent engineers, familiar with bridge and marine construction, established that the fender system provided at the Ashley River Bridge was adequate for its intended purposes.

(F) Because of the negligent and unseamanlike handling of the vessel, the forward part of her hull on the port side first struck the gear rack used to operate the western bascule, before any of the vessel's superstruc-

ture had entered into the draw opening, and this blow on the gear rack caused loss of compression support to the bascule, which sagged or fell immediately, and was thereafter in collision with the vessel's superstructure.

(G) The position of the gear rack, according to qualified Army Engineer personnel, and other engineers familiar with erecting structures constituting obstruction in navigable waters, was not violative of the War Department Permit for the bridge.

(H) The Pennsylvania Rule is a rule of evidentiary presumption, and does not take the place of facts; established facts in this case prevent the imposition of its sanction against the stationary bridge because under the facts of this particular collision, and the manner in which it occurred, the statutory violation by the bridge could not, with reasonable possibility, have contributed to the accident and damage.

A. THE BRIDGE

The Ashley River Bridge was built between 1923 and 1925, pursuant to authorization of the South Carolina Legislature (30 S. C. Stat. 1072) after plans for the construction and location of the same had been submitted to War Department officials and an approval permit issued May 23, 1923 (33 U. S. C. A. Sec. 401). Shortly after its completion, the bridge was taken over by the South Carolina State Highway Department, and has since been operated and maintained by that Department. The bridge spans the Ashley River and provides a double leaf or bascule type of draw opening at channel. The direction of the 110 foot channel is approximately southeast to northwest, and it is on a 20° skew or angle measured counter clockwise from a perpendicular to the center line of the roadway on the bridge.

The bridge provides four lanes for vehicular traffic, the flow of which at the time of the collision five years ago comprised some 30,000 motor vehicles daily. Water traffic through the draw is relatively light, averaging about 300 passages per year, of which only very few were made by large vessels. Only 4 or 5 Tankers had been sent through this draw in the seven years preceding this collision (Appellee's Appendix No. 7604, p. 386-387).

The bridge permit granted by the Army Engineers in 1923 shows for this draw opening a "110' 0" clear channel," and this 110 foot dimension is also given on the applicable Coast and Geodetic Chart. The permit shows further "138' 0" clear" between the fenders which are located inside the draw opening close to the concrete side abutments. Lastly, the permit shows "146' 0" face to face" between concrete abutments, thereby leaving 4 feet on each side for a protective fender system. The simple sketch plan made a part of the permit is attached hereto as *Annex A*, with the red lines shown thereon as they appeared on the original permit. These red lines have great significance inasmuch as the Army Engineers' regulations require that the clearance of the navigation opening of a bridge of this type be outlined in red, and the clearance here outlined in red is that between fenders only, and not between the concrete abutments. The fender system on each side consisted of a line of piles driven far into the mud and joined together with horizontal strake boards on the channel side, with heavy timbers on the top providing a walkway. The piles along the face of the concrete abutment were not braced or battered against a blow from the channel, and in fact could not be so braced or battered because of a protruding concrete ledge far under the mud out towards the piles (Appellant's Appendix in No. 7604, p. 89-90). When new piles were added, from time to time, no effort was made to remove piles for whose replace-

ment the new piles were intended (Appellant's Appendix in No. 7604, p. 27, 218, 243).

Each bascule consists of two long steel girders supporting the roadway in between. These girders were widest in the vertical plane at the point near the trunnion or axle about which the bascule rotates. The two girders on each leaf were connected and held in place in their vertical plane by trussed cross frames and stiffeners under the roadway. Heavy steel flanges in the horizontal plane furnished bearing and weight-supporting strength to the upper and lower side of each girder. In any position of the bascule, the top flange is subject to tension and the bottom flange to compression. The maximum compression area of the lower flange is at the trunnion or axle end where the gear rack is attached to it.

Electric motors assisted by counter weights raise and lower the bascule arms by operating a system of gears near the foot of each girder. A gear-wheel pinion engages a quadrant gear rack attached to the bottom flange of each girder, and the movement of these pinions forces the gear rack and the bascule up or down. This gear rack can be plainly seen in *Annex B*. The pinion which moves the gear rack is out of sight inside the concrete abutment. When the bridge is closed, the two bascule tips are connected and held together by a mechanical center lock which makes the roadway level. In the closed position, the trunnion ends of the girders of each bascule rests on heavy cast steel blocks attached to the bottom flange of each girder. These blocks are known as live-load blocks or shoes, and in closed position they rest on similar but immovable blocks secured to the concrete abutment. In the raised position, this live-load block is about 2½ feet above the upper end of the gear rack on the lower flange of each girder.

In the process of raising or lowering the bascule, the gear

racks move in a constant arc, and the outermost point of protrusion of the teeth of the gear rack extends about 18 inches beyond the face of the concrete pier, but, at the corner where this collision occurred, 3½ feet within or shoreward of the fender piling along the face of the concrete pier. No portion of the gear rack in question at the time of this accident extended channelward of the fenders; the gear rack which was struck by the FORT FETTERMAN was 3½ feet back of or shoreward of the fenders. By the same token, the gear rack was 3½ feet shoreward of the line on the permit representing the limits of the 138 foot clearance required thereby, and did not in any way reduce or interfere with this clearance. Similarly, the gear rack in question was 3½ feet shoreward of the red line drawn on the permit sketch to mark the navigational clearance of the draw opening, and did not encroach or protrude into that clearance. The Respondents are most anxious that this feature of the bridge construction and operation be made clear because they fear that their failure to make the same clear and understandable in the first appeal in this litigation resulted in an inadvertent misunderstanding by the Court of Appeals. Fortunately, Respondents' failure in this respect was remedied on rehearing and at the remanded trial.

B. THE COLLISION AND EVENTS LEADING TO THE COLLISION.

The FORT FETTERMAN arrived in Charleston Harbor on the afternoon of October 4, 1955, with a cargo of creosote consigned to the Koppers Company, which is located several miles up the Ashley River. Due to silting in the Ashley River (upstream from the bridge), it was necessary that the FORT FETTERMAN be lightened. As a consequence, a portion of her cargo was transferred to barges until she was lightened to a desired draft of 15 feet fore and aft. She got under way

on her voyage to Koppers at about 9:00 A.M. on the morning of October 5, 1955, proceeding south in the Cooper River of Charleston Harbor for about a mile, and then making a right hand turn at White Point Buoy to set a generally northwest course up the Ashley River towards the Ashley River Bridge. The distance from White Point Buoy to the Bridge is about 5,000 yards, and there are no bends or turns in the River between the two points. A partial drawing, traced from the Coast and Geodetic Survey Chart of Charleston Harbor is attached hereto as *Annex C*; various land marks referred to in the testimony and in the opinions below have been identified on this tracing. The chart was an exhibit at the trial.

On the day in question the weather was clear and visibility was good; there were no mechanical breakdowns on the ship at any time, and all orders from those in charge of her management were promptly carried out during the entire period involved in the collision. The wind was blowing from the east at a speed of about sixteen miles per hour; tide was flooding at not less than two or three knots in the same direction as the vessel was moving, and reached an unusual high of 7.2 feet above mean low water at the bridge one hour after the accident. At a 15 foot draft the FORT FETTERMAN showed more than 24 feet of hull exposed above the water line; at this draft, 7 feet of her rudder extended out of the water, as did 6 feet of each propeller blade on every revolution, as can be seen from Exhibits A, B, C and D to the Petition for Certiorari. A tug was employed to accompany the vessel up the river, but at no time assisted her nor communicated with her. The Trial Court found that the bascule spans of the bridge were opened in ample time for the transit of the vessel. At the Black Can Buoy, about 900 yards below the bridge, the FORT FETTERMAN moved to her left or to the leeward side of the river in order to reach a position from which she might again come to the right and proceed upstream in

direct line with the skewed draw opening. A two to four knot current in the river was on her starboard quarter, and the sixteen knot wind was just about directly on her exposed beam. After she was put down to leeward, the Pilot put on a hard right rudder and crowded on speed in an effort to bring her back up against the wind and current so as to enter the draw in proper fashion. The full speed and right rudder put her bow to the right and her stern to the left, but she never recovered sufficiently from her downwind maneuver to be straightened out for her passage through the draw opening; crabbing sidewise under a full speed ahead bell, she crashed into the protective fender piling on the downstream corner of the west concrete abutment. The force of this blow crushed the fender piling back several feet and up against the concrete abutment permitting the hull of the vessel, at a point on the port side 135 feet aft from the stem about 2 feet below her flush main deck, to hit the quadrant gear rack which supported the downstream girder of the upraised western bascule. Following this contact, the ship rebounded or moved away from the western abutment and proceeded through the draw. Her speed was not reduced until after contact with the bridge structure. Photograph No. 18 of Respondent's Exhibit P-1 is attached hereto as *Annex B* in order to familiarize the Court with the nomenclature of the bridge structure and to show the appearance of the bascule without damage. In this photograph, passage of the vessel should be visualized as angled from the right background to the left foreground, and crashing into the corner of the fender system below the gear rack.

The blow of the ship's hull on the gear rack broke and bent the same and thereby caused a twisting or distortion of the bascule's lower flange and girder. As soon as this flange and girder were distorted and twisted out of the plane in which they were designed to bear a load, the girder failed and crumpled at the point of the blow to the gear rack, and the

downstream side of the western bascule sagged or drooped downward on or into the path of the ship's superstructure, which is some 40 feet aft of the point where the hull initially struck the gear. Photograph No. 13 of Respondent's P-1 is attached hereto as *Annex D* to show the point on the vessel's hull where initial contact was made with the gear rack and the point some 40 feet aft where her superstructure begins at the rising curve of her fashion plate. The superstructure of the vessel did not collide with the erect bascule at its original elevation ;the failure of the girder resulting from the blow of the ship's hull on the gear rack and the consequent distortion of the flange caused the bascule or its downstream girder to drop several degrees from its original elevation before the superstructure of the vessel ever entered into the immediate draw opening. The collision of the vessel's fashion plate and superstructure with the already falling bascule caused further damage to the bridge and the vessel, and the bascule slowly collapsed along the vessel as she went through and finally fell into the water. Photograph No. 20 of Respondent's Exhibit P-1 is attached as *Annex E* to show the damaged mechanism after the accident. The camera here is facing the direction from which the vessel came, and the broken and bent gear rack, as well as the crumpled and displaced lower flange are plainly visible in this photograph.

C. THE FORT FETTERMAN WAS NEGLIGENTLY HANDLED.

Despite trial findings and appellate affirmances against the vessel on the propriety of her navigation at and prior to the collision, Petitioner, on pages 16 and 17, and pages 57, 58 and 59, and page 61 of its Petition, once more belabors the point in an effort to obtain factual review by this Court. Again the Petitioner claims that the collision resulted from a "sudden sheer." The record does not sub-

stantiate this assertion. The Trial Judge initially found, among other things, that the vessel was in good position for her approach to the draw opening at the time the bridge had completed opening, that she had steerageway, was not yawing to one side or the other, and that everything was proper to go through the bridge. He further found that the bridge had completed opening "anywhere from four to ten minutes prior to the entrance of the bow of the ship into the draw opening." He further found that the vessel's last movement to the right greatly accentuated the adverse effect of both wind and tide in the handling of the vessel, and it was the failure to anticipate and make allowances for the same that caused the vessel's faulty approach. In addition, his findings included one to the effect that the force of the wind on the extraordinarily large sail area of the vessel, together with the current setting her to leeward, were not sufficiently provided against by the Pilot and the ship's officers, and that her approach to the draw opening from the leeward side was in violation of the time honored rule requiring mariners to "keep off the lee shore." He specifically found that the accident could have been avoided if those in charge of the vessel had waited for slack high water, had they allowed for wind and tide effect, or had they used the available tug to assist them in making the proper entrance into the draw opening. (155 F. Supp. 359, 1958 A.M.C. 1735). The Court of Appeals for the Fourth Circuit heard oral argument in March of 1958 and again on April 21, 1958, pursuant to an Order for Re-argument after the death of Judge John J. Parker, who had participated in the first hearing. With respect to the navigational skill of those in charge of the vessel, that Court said: "We have no difficulty in agreeing with the District Court as to its conclusions of improper navigation on the part of the Pilot and the ship's officers of the appellant vessel." The author of the opinion enlarged on this statement by pointing out that slack water tide would

have been preferable to a flood tide in negotiating passage of the vessel through the draw. Comment was also made with respect to the failure of those in charge of the vessel to exert any effort to determine or allow for the effect of the wind and tide on the vessel's maneuvering, although they were cognizant that the wind and tide were having an adverse effect on the vessel whose 68 foot beam had to be put through a charted bridge opening of 110 feet. The Court of Appeals summed up on this point as follows: "Success in the execution of this passage required care which was obviously absent in this case." Petitioner's insistence after two trials and two appellate reviews that the facts are otherwise requires Respondent to point to some of the evidence in the record supporting the conclusion of two Courts that the vessel was negligently managed.

The ship's agent was told by the Charleston Pilots office that the safe time for beginning the trip up the Ashley River was 9:30 in the morning (Appellee's Appendix in No. 7604, p. 67, 68, 385), but the Pilot, having been ordered aboard at 8:30, got her underway at 8:58, fifty-two minutes before the time recommended by the Pilot's Office (Appellee's Appendix in No. 7604, p. 87, 292, 293). It was nowhere questioned that the ship, having been lightened to a draft of about 15 feet, was showing a freeboard of about 24 feet; further, the testimony indicated that the vessel had with her a fair tide of 3 or 4 knots, according to experienced marine or naval witnesses (Appellee's Appendix in No. 7604, p. 131, 146, 163, 170). In the face of this, the Captain of the vessel, at the Coast Guard Hearing on the day immediately after the accident, testified that it was unusual to take a light vessel through such a bridge with a fair tide and that he did not like to do it if he could help it ((Appellee's Appendix in No. 7604, p. 13). The more than 12,000 square foot sail area of the lightened vessel and the effect of a 16 or 17 knot beam

wind thereon was recognized by the Captain, as was the fact that at a 15 foot draft the FORT FETTERMAN exposed 7 feet of her rudder and 6 feet of each propeller blade out of the water (Appellee's Appendix in No. 7604, p. 35, 290). The Pilot in charge of the FORT FETTERMAN had only taken one vessel through this bridge in the preceeding five years (Appellee's Appendix in No. 7604, p. 86).

The vessel's Captain knew that the wind was setting his vessel to leeward (Appellee's Appendix in No. 7604, p. 38); he also testified that the ideal position for his ship was on the right hand or windward side of the river (Appellee's Appendix in No. 7604, p. 50). Notwithstanding their alleged experience and knowledge, those in charge of the vessel took her down to leeward some 900 yards below the bridge (Appellee's Appendix in No. 7604, p. 2-3, 92, 247, 332, 133, 145, 199). The FORT FETTERMAN was never able to recover from this downwind movement, and in spite of the fact that she put on a hard right rudder and increased to full speed ahead during the few minutes preceeding the accident, she was never able to get back to windward, and crashed into the leeward side of the draw opening with the vessel on an angle, her stern down to the westward of the draw opening (Appellee's Appendix in No. 7604, p. 2, 100, 364, 366, 365, 15, 21, 73, 82-83, 135-136, 154, 161, 171-177, 182-183).

The following is the explanation given by the Captain in his deposition taken only three days after the collision:

> "Q. And it was safe at that time to give the order full speed ahead and you presumed that you could negotiate the passage?
>
> A. Yes.
>
> Q. But you didn't negotiate the passage, did you?
>
> A. No.

Q. Well, what was the error of judgment, Captain?

A. I don't know.

Q. There was an error of judgment, wasn't there?

A. No, I don't think it was an error of judgment.

Q. Well, what happened,—an act of God came in there?

A. There was an act of God in this.

Q. What was the act of God, Captain?

A. That I don't know.

Q. Was it the force of the wind that was the act of God?

A. A combination.

Q. Of what? Wind?

A. Wind.

Q. Tide?

A. Tide.

Q. A lot of freeboard?

A. Freeboard."

(Appellee's Appendix in No. 7604, p. 52). Thus is responsibility for known or predictable factors of good seamanship lightly passed on the Deity.

The Pilot himself stated that he had to put on full right rudder to bring the ship well to windward (Appellee's Appendix in No. 7604, p. 100), and that the wind and tide caught the vessel and knocked it over (Appellee's Appendix in No. 7604, p. 366): he even conceded that after giving her a hard rudder and full speed ahead there was nothing else to

do but "hope to God" (Appellee's Appendix in No. 7604, p. 365). The vessel's own Helmsman, Moss, testified that the ship was on the left hand side of the bridge approach "in a sort of angle" when he received the hard right rudder order (Appellee's Appendix in No. 7604, p. 15). The witness Higgins stated that the ship approached the bridge at an angle with her stern to the left (Appellee's Appendix in No. 7604, p. 73). The witness Gasque, who, in his outboard motor boat was trying to get ahead of the FORT FETTERMAN, testified that she began to crab off to the left or leeward and that her stern fell off to the left as she got to the draw opening (Appellee's Appendix in No. 7604, p. 135-136). The Naval Commander, expert and eye-witness, Engler, testified that the ship was crabbing over to the left as it moved into the draw (Appellee's Appendix in No. 7604, p. 154). The expert and eye-witness Navy Lt. McMurray testified that the vessel's approach was definitely with the west and that by the time she entered the bridge her stern was actually down to westward of the bridge opening (Appellee's Appendix in No. 7604, p. 171-172). The witness Wilson testified that the vessel approached at a peculiar angle because of the wind, with her stern over to the west (Appellee's Appendix in No. 7604, p. 182-183).

In spite of the foregoing testimony from the ship's own witnesses and from disinterested witnesses with maritime experience, Petitioner, after failing to convince the Trial Court and the Appellate Court that the vessel took a "sudden sheer," now tries to make this Court believe that this tremendous vessel suddenly made a perpendicular 90° sideways movment to the left of her course when she was passing through the draw. Regardless of all testimony, Respondent submits that this is palpably ridiculous and a physical impossibility. The ship's personnel had an opportunity to testify about this accident at a formal Coast Guard Hearing on the day follow-

ing the accident and on adversary depositions three days following the accident, but at no time, until the trial of the case 21 months after the accident, did the "sudden sheer" appear in this litigation.

D. THE DRAW WAS OPENED IN AMPLE TIME.

Petitioner, beginning on page 56 of its Petition, again undertakes to charge the bridge with slow opening, although the Trial Judge had found that "at the time the bridge had completed opening, the FORT FETTERMAN was at or a little north of Black Can Buoy No. C-5, which is on the port side of the channel 900 yards below the bridge", and that the bridge had completed opening anywhere from four to ten minutes prior to the entrance of the vessel's bow into the draw opening. The Court of Appeals held that Petitioner's contention of delay in bridge opening was sufficiently answered by the ship's own personnel "who unanimously affirmed that the ship had perfect steerageway and control at two knots or three knots while she was well down stream and 'killing time' awaiting the opening of the bridge. The Captain conceded that, irrespective of the alleged delay, the vessel was in good position to go through the bridge. The Pilot and Third Mate testified substantially to the same affect. The evidence of Appellant's own witnesses proves conclusively that the delay, if any, in opening the bridge had no relation to the collision".

Respondent put on some nineteen witnesses on this point, one of whom was its Bridge Tender, and one of whom was the ship's Third Mate, the other seventeen being disinterested eye-witnesses. Only a few specific instances need be cited to show the preponderance of evidence to the effect that, with respect to time and distance, the bridge had completed opening well before the vessel approached: Captain Gasgue, a veteran handler of small boats in this area, stated that when the

bridge had completed opening the ship was at the Black Can Buoy, which is 900 yards below the bridge (Appellee's Appendix in No. 7604, p. 134-135). Captain Engler, a veteran naval officer whose daily duties involved routine estimates of tide, wind, distances, etc., in this area, testified that when the bridge had completed opening the FORT FETTERMAN was even further away, below the Black Can Buoy (Appellee's Appendix in No. 7604, p. 155). Lt. McMurray, another active naval officer, expressed the view that at the time the bridge was opened completely the FORT FETTERMAN was 1200 yards below the bridge (Appellee's Appendix in No. 8604, p. 172). Other civilian eye-witnesses in automobiles on the bridge who were held up by the opening of the draw testified variously that the bridge was open 5 - 6 - 7 or 8 minutes prior to the time the vessel arrived at the draw opening (Appellee's Appendix in No. 7604, p. 111, 112, 123, 162, 166, 185, 187, 190, 193 and 196). The Captain testified that when the vessel was a quarter of a mile from the bridge it was safe to negotiate the passage, and that the ship's position and speed were safe for proceeding (Appellant's Appendix in No. 7604, p. 118). He further testified that the vessel's head was holding up and that he was in proper position in the channel in relation to the bridge (Appellant's Appendix in No. 7604, p. 119). In response to a specific question, the Captain said that at the time the bridge was fully open he was in a good position to go through, regardless of any delay prior to that time, whether there had been any or not (Appellee's Appendix in No. 7604, p. 308).

Notwithstanding all the foregoing substantial and credible evidence which has formed the basis for a finding by the trial Court and the affirmance of such finding by an Appellate Court, the Petitioner still apparently feels able to include in his Petition for Certiorari the following unfounded and unsupported statement: "There is no question but that there was delay in opening the bridge and that as a consequence the

ship's speed was substantially reduced and its momentum impaired".

E. THE FENDER SYSTEM WAS ADEQUATE.

The fender system was all that was required, and served its purpose.

On page 50, and again on page 53, Petitioner assigns to the War Department permit for construction of the bridge a requirement respecting the make-up and location of the fender system at the bridge. Respondent is more than a little surprised at this unsupported statement whereby after five years of litigation the vessel for the first time now claims that the War Department permit prescribed the quantity or quality of pilings and fenders at the bridge. Not only is there no evidence in the record supporting such a statement, but on the contrary, Petitioner's cross examination of the State Highway Department's Bridge Engineer affirmatively elicits that the fender symbols on the permit drawing were symbolic only, and that the same were not intended to show the number or size or any other details with respect to the fender piles (Appellee's Appendix in No. 7604, p. 285). One glance at the permit drawing will show that he is correct. See *Annex A*.

Petitioner's statement with reference to the "uncontradicted testimony" regarding the condition of the fender system must now again be recontradicted. Respondent's expert engineer witness, Col. L. S. LeTellier, had inspected the damage shortly after the collision, and testified that the purpose of the fender was to serve as a cushion to prevent destruction of the pier, and that this particular fender had served its purpose to a large extent because, if it had not, the terriffic impact of the FORT FETTERMAN might very well have destroyed the concrete abutment of the bridge, since the FORT FETTERMAN, because of her size and speed at the time of the

impact, was exerting a potential energy in the neighborhood of sixty million foot-pounds (Appellee's Appendix in No. 7604, p. 233, 227). The Highway Department's Bridge Engineer, W. J. Gooding, testified that no fender system could have been constructed to hold off even a "breasting action" of a ship the size of the FORT FETTERMAN (Appellee's Appendix in No. 7604, p. 284). The ship owner's expert witness, Grushky, himself admitted that even wharves were not designed to sustain the "breasting action" of a ship moving at 4 knots (Appellee's Appendix in No. 4806 p. 391). The ship owner's witness, Reggie Rudd, a diver, was apparently sent down to check the underwater portion of the fender system which was hit by the ship; his testimony not only did not prove any defects in the fender system, but on the contrary, it shows that he found the pilings he was asked to check to be "good whole piles" and unbroken all the way from the water line down into the mud (Appellant's Appendix in No. 7604, p. 217-218). Similar testimony from the witness Barstow at the second trial establishes that the fender system provided for the Ashley River Bridge was standard for bascule bridges of this type (Appellee's Appendix in No. 8023, p. 85, 102-103, 106-107). This witness indicated that if the fender system had been connected to the concrete pier, the pier may have been destroyed.

Petitioner has included in an appendix to its Petition a photograph apparently showing some barnacle encrusted portion of a fender system, but the same, insofar as Respondent is aware, has not been otherwise identified or connected to this litigation.

Respondent submits that the foregoing evidence as to the quantity and quality of the fender system is ample to constitute support for a finding that the design and location of the fender system was standard for this type of bridge, and

that the blow or impact delivered to it by the FORT FETTERMAN in the circumstances of this collision was not reasonably to be anticipated or fended off by a proper and adequate fender system, and that the force of this collision far exceeded any normal or ordinarily foreseeable impact and therefore, was to all intents and purposes, impossible to guard against. (177 F. Supp. 76, at page 83, 1959 A.M.C. 2403 at page 2414.)

The Court of Appeals agreed with the District Court's conclusion that the fender system could not have prevented contact nor, irrespective of its condition, caused the vessel to deviate and avoid contact. The duty of a bridge owner with respect to providing protective fender systems has been set forth by the Fourth Circuit Court of Appeals in *Savannah and N. Y. Trans. Co. v. Klaren Bridge Co.*, 4 C. A. 1918, 252 Fed. 499: They need only be able to withstand the ordinary usual bump, scrape, touch, or contact to the sides in the passage of the type of vessel expected to pass through the draw.

F. THE BLOW OF THE VESSEL UPON THE GEAR RACK AND GIRDER ATTACHED WAS THE DIRECT AND EFFECTIVE CAUSE OF THE DAMAGE.

The Petitioner, on page 19 of the Petition, still asserts that the damage to the bridge resulted from a collision of the superstructure of the vessel and the overhanging span. So far in this litigation, the Petitioner has not been able to convince any Court, either trial or appellate, that this contention is correct.

The Decree on the first trial very clearly determined that the first contact between the vessel and bridge structure occurred before the ship's superstructure had entered the draw opening and that this contact was at a point on the port side

of her hull about opposite her foremast a few feet below the main deck line about 135 feet aft of her stern and about 40 feet forward of her fashion plate and superstructure (see *Annex D*). This contact of the hull was with the gear rack on the downstream girder of the western bascule. On this first trial, the Court further found that the blow of the vessel's hull against the gear rack caused the downstream side of the western bascule immediately to droop, sag, and fall from its approximate 71° elevation *before the vessel's fashion plate and forward superstructure had entered the draw opening* (emphasis added), and that during that time, the vessel, being still under forward momentum, rebounded or glanced off from the abutment and fenders to her right, so that during the few seconds required for the fashion plate and superstructure to move forward to a point opposite the downstream girder, she was no longer in contact with the fender system, but was out in the clear opening between fenders. The Court further found that during these same few seconds the downstream girder fell several degrees, so that it dropped on or directly in the path of the oncoming vessel's fashion plate and superstructure. Petitioner's theory on this first trial that the bascule was still erect and undamaged at the time the vessel's superstructure came into contact with it, was rejected in favor of the finding that the blow of the vessel on the gear rack twisted the bascule girder out of the plane in which it was designed to bear weight and stress so that its compression was lost and the natural force of gravity caused it to sag or fall on or in the path of the FORT FETTERMAN'S superstructure. (155 F. Supp. 359 at 365 and 366, A.M.C. 1735 at 1744 and 1745). Respondent proved at the first trial that the vessel's fashion plate could not possibly have come into contact with the girder unless the bascule had fallen from its 71° elevation (Appellee's Appendix in No. 7604, p. 220-221).

The Court of Appeals recited the Lower Court's holding

that the damage to the bridge was inevitable after the initia contact between the hull of the vessel and the gear rack whic caused the girder to drop in the path of the vessel's super structure. The Court of Appeals further mentioned a con flict of evidence on this phase of the case, but announced that it accepted as a fact that the gear rack was broken and bent in the manner described.

On the remanded trial, the District Court stated (177 F Supp. 76 at 82, 1959 A.M.C. 2403 at 2413):

> "Eye-witness and expert engineering testimony at the first trial convinced me that the first blow of the hull of the Fort Fetterman against the gear rack and girder caused the west bascule to fall on or in front of the ship's superstructure, thereby effectively destroying the bridge and inevitably producing the damage to both bridge and vessel. Not only has there been nothing developed at the remand hearing to weaken this finding, but on the other hand, the same has been strengthened in this regard by additional expert testimony. I find, therefore that on this point the libellant has met the burden imposed by the Pennsylvania Rule."

The Court of Appeals, after appeal from the result of the District Court trial on remand, announced (278 F 2d 921 at 925, 1960 A.M.C. 1325 at 1328) that on the former appeal it had accepted as a fact the Trial Court's finding that the initial contact of ship with gear rack caused the collapse of the bascule span. Notwithstanding the Trial Court's repeated finding and its affirmance and reaffirmance by the Court of Appeals, the Petitioner tenaciously clings to his view that the vessel collided with the upright span and caused it to collapse, thereby ignoring the blow to the gear rack and its proven sequelae. A few references to the record will show the substantial evidence supporting the affirmed and reaffirmed find-

ings with respect to the falling of the bascule immediately after the blow of the vessel's hull upon the gear rack and prior to any contact between the vessel's superstructure and the bascule.

Qualified engineers presented by Respondent at both trials were unanimous in their opinion that the blow of the vessel's hull against the gear rack displaced the down stream girder from the vertical position in which it was designed to bear weight and compression and that gravity caused it immediately to commence collapsing (Engineer LeTellier, Appellee's Appendix in No. 7604, p. 215-216; Engineer McCrady, Appellee's Appendix in No. 7604, p. 268; Engineer McDonald, Appellee's Appendix in No. 7604, p. 240-242; Engineer Gooding, Appellee's Appendix in No. 7604, p. 283; Engineer Barstow, Appellee's Appendix in No. 8023, p. 93).

Petitioner, on page 25 of its Petition, baldly states that "there were no eye witnesses who could say they saw the span collapse as the result of the hull striking the gear rack . . . ". The following references to the record will dispose of Petitioner's unfounded statement in that regard. The witness, Miss Hughes, testified that the span "crumbled" when the hull of the vessel hit the west side of the bridge opening (Appellee's Appendix in No. 7604, p. 113-114), and on cross examination repeated that the span "crumpled as soon as the ship hit the concrete part . . . . the lick made the span crumple" (Appellee's Appendix in No. 7604, p. 118). Mrs. Bones testified that when the bow of the ship went through the draw and before the vessel's superstructure had come up to the draw opening, there was a screeching and scraping vibration "down below" and a sway of the bascule itself at the time of this rubbing and scraping "down below" (Appellee's Appendix in No. 7604, p. 123-124). Similarly, the witness Gasque emphasized that the bascule moved before it

came into contact with the vessel's superstructure, and in response to a question from the Court, stated that the bascule moved before the bridge of the vessel struck it (Appellee's Appendix in No. 7604, p. 142-143). The witness Engle testified that he saw the bascule of the highway bridge turn over on the left hand side "and it was just like a slow motion picture, old silent movie, the way that bridge just rolled, seemed to roll under. As it came it caught the bridge of the ship and then the mast and then finally the stack. After the ship had gone through it just fell off into the water". (Appellee's Appendix in No. 7604, p. 146). The witness Singleton testified that upon first contact between ship and bridge structure, before the vessel's superstructure had entered the draw he "saw the bascule kindly (sic) quiver; then it started to fall and twist, a twisting slow twist" (Appellee's Appendix in No. 7604, p. 201). The Pilot of the vessel himself, at the Coast Guard Hearing on the day immediately following the accident, remarked in an unguarded moment "the upper part of the bridge fell down on us." When confronted with this statement at the trial some twenty months later, the Pilot said he "might have meant something else." (Appellee's Petition for Rehearing in No. 7604, p. 56).

Respondent respectfully directs the attention of the Court to photograph Exhibit B in the Appendix to Petitioner's Petition, and suggests that the same shows very clearly the twisting or curling slow motion effect of the falling bascule and the sagging of the downstream girder, all of which had obviously occurred before the vessel had completed passage through the draw opening. This photograph, as well as Exhibit C following it, very plainly shows the angular approach of the vessel to the draw opening with its bow over to the right and its stern down to the left. By the time she had reached the position shown in Exhibit D her left rudder had brought her bow somewhat to the left.

G. THE POSITION OF THE GEAR RACK WAS NOT VIOLATIVE OF THE WAR DEPARTMENT PERMIT.

We have already noted that on the first appeal on the merits, the Fourth Circuit Court, in its first Opinion, got the impression that the position of the gear rack in relation to the face of the concrete abutment violated the permit because it did not appear on the sketch, which constituted the 'plans" required by 33 U.S. Code, Sec. 401. After granting a Petition for Rehearing, in which the Respondent vigorously contended that the location of the gear rack was not violative of the permit, the Court sent the case back for retrial to determine, among other things, if the so-called protrusion of the gear racks beyond the face of the concrete abutment constituted a statutory fault. Much testimony was taken at the second trial to determine what was required to be shown on this sketch which constituted the so-called "plans" required by Section 401.

Testimony was obtained from one Robert J. Kennedy, Chief, Miscellaneous Branch of Civil Works, Army Engineers. Kennedy's testimony established (Appellee's Appendix No. 8023, p. 6, etc.) that the Army Engineers' concern in applications of this sort, is that the proposed bridge will provide adequate opening for navigation, and that it will be of reasonable height and width. His office never sees and is not concerned with the detailed plans or shop drawings. They merely see a sketch which is ordinarily of letter size, which shows the stream, the location of the bridge, and the plan and elevation of the bridge. The sketch shows vertical clearance and horizontal clearance, and, in the case of a drawbridge, must show the span in two positions, closed and open. The Army Engineers' concern is directed to "clear width." Kennedy stated that as to clear width "generally it's between fenders" since the navigational fairway is limited by the fender system.

The witness Conway, Chief of the Legal Department in th Charleston District Engineers' Office since 1951, testified tha the primary concern of his office was the navigable openi after the bridge had been built (Appellee's Appendix N 8203, p. 64). Conway testified specifically that in the ca of the Ashley River Bridge, where the gear rack extend eighteen inches beyond the face of the concrete pier housi when the bascule was in raised position but still some 3½ fe back of or shoreward of the fender line, (indicated by the re lines on the permit) there was nothing to require the gea rack to be shown on the "plans" under his interpretation o the applicable regulations. He then stated affirmatively tha the failure to show the gear rack on the sketch did not con stitute a violation of the permit. The witness Worth Cand rick, Technical Assistant to the Charleston District Engine and the chief civilian employee of that office for many year testified that he reviewed and recommended the approval o disapproval of all bridge applications. His testimony, like tha of Mr. Kennedy, indicated that the Engineers' primary con cern is the ease of navigation through the draw expressed i horizontal and vertical clearance through the bridge (Ap pellee's Appendix in No. 8302, p. 72). He noted that the re lines on the permit are intended to outline the useabl clearance after completion of the bridge. He stated that i his opinion the regulations did not require that the gear rac be shown on the sketch accompanying the permit applicatio The testimony of these three important civilian employees o the War Department is corroborated by the testimony of th witness Roberts, who was Resident Engineer for the Sout Carolina State Highway Department in the 1920s during th construction of the Ashley River Bridge, and of the witne Williams, who, during that period of time was Inspector fo the Charleston District Engineers' Office, and of the witne Rivers, who was an Assistant Engineer during that perio

in the Charleston Engineers' Office. It was also corroborated by the witness Barstow and the witness Gooding. Barstow, who as a young engineer participated in the design of the Ashley River Bridge, has since participated in the design of bascule bridges all over the world.

The District Judge on the record in the second trial commented on the close liaison between the Army Engineers and the State Officials in the construction of so important a structure as that involved in this case. The Court noted that the work of the Army Engineers did not stop following the issuance of the permit by the Secretary of War, and on the local level, liaison of the most cooperative nature was maintained between the Army Engineers and those building the bridge. Periodic inspections were made to avoid costly mistakes and to insure that the conditions of the permit were observed. During the period of constructing the Ashley River Bridge, constant contact was maintained between the office of Army Engineers and the Engineers of the State Highway Department. At that time the Ashley River Bridge was one of the most important bridges on the Atlantic Coast and it had been much publicized both on the local and regional levels.

In connection with this aspect of the case, the Respondent produced Engineer Barstow, formerly in the employ of the Strauss Bascule Bridge Company which had designed the bascule spans. The witness stated that the contract drawings as well as the detailed shop drawings which were followed in the construction of the bridge faithfully implemented the permit. It was established that the Army Engineers, during the many inspections that were made on the progress of the work, had ample opportunity to examine the shop drawings. Proof was also offered that after the bridge was constructed, the bridge had been inspected and was certified by the Char-

leston Office of Army Engineers to the Secretary of War as having been constructed in accordance with the permit. On the basis of the facts here related, the District Court found and the Court of Appeals affirmed, that the protrusion of the gear racks from the face of the concrete abutment was not a feature affecting navigation and was not required to be shown on the sketch (plans) submitted for approval.

As soon as the question of the legality of the position of the gear rack arose in the case, the Respondent was quick to admit that if the gear rack was illegal, a case of mutual fault existed because the theory of its case from the very first had been that the destruction of the gear rack was the effective cause of the destruction of the bridge[19], but the elaborate record at the remanded trial made it clear that the Petitioner's contention that the gear rack had to be shown on the minute sketch accompanying the permit, notwithstanding that it was 3½ feet shoreward of the navigable fairway, is altogether specious.

H. THE PENNSYLVANIA RULE IS A RULE OF EVIDENTIARY PRESUMPTION THE BURDEN OF WHICH CAN BE OVERCOME BY PROVEN FACTS, AND IN THE CIRCUMSTANCES OF THE COLLISION AS IT OCCURRED IN THIS CASE SUBSTANTIAL AND CREDIBLE EVIDENCE ESTABLISHES THAT THE DRAWBRIDGE HAS MET AND OVERCOME THE BURDEN OR PRESUMPTION OF THE PENNSYLVANIA RULE, SINCE IT HAS BEEN CLEARLY SHOWN THAT THE FAILURE TO ELEVATE THE BASCULE HIGHER THAN 71° COULD

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[19]The Respondent's libel, prepared five years ago immediately after the collision, alleged inter alia that the FORT FETTERMAN ". . . . crashed into . . . . the protective fender piling . . . . struck the gear used to raise and lower the bascule span . . . . the blow against the gear and girder caused the western bascule to slowly fall . . . . " (Appellant's Appendix in No. 7604, p. 2-3).

NOT WITH ANY REASONABLE POSSIBILITY HAVE CONTRIBUTED TO THE COLLISION AND CONSEQUENT DAMAGES.

(1) THE PENNSYLVANIA RULE.

The so-called Pennsylvania Rule was pronounced in the opinion of the Supreme Court in the case of *The Steamship Pennsylvania vs. Troop*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148, decided in 1874. That case involved a collision between a bark owned by Troop and the steamship PENNSYLVANIA. The collision occurred in a dense fog. The Court first found the Pennsylvania guilty of unsafe navigation in maintaining a speed of seven knots prior to the collision. It then took occasion to consider the fog signal which had been given by the bark. The Court noted that the rules of the road require a sailing vessel when under way to use a fog horn, and when not under way to use a bell. The bark had used a bell as its warning signal, notwithstanding that she was under way and was constantly changing her position. Having reached this conclusion, the Court them made inquiry as to whether the fault of the bark contributed to the collision and whether in any degree it was the cause of the vessel coming into dangerous position. It stated that, "It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration", but it went on to say that when, as in this case, a ship at the time of a collision is in actual violation of the statutory rule intended to prevent collision, it is no more than a reasonable persumption that such fault was at least a contributing cause of a disaster. They went on to pronounce the so-called Pennsylvania Rule, which is to the effect that one guilty of a statutory fault must show that not only would the fault not cause or contribute to the cause of the disaster, but must go further and show

that the fault could not have been a primary or contributing factor.

The entire discussion made it clear that the Court was talking about a rule of evidentiary presumption. Apropos of this it said, "In some cases it is possible to show this (that the fault did not contribute or could not have contributed) with entire certainty. In others it cannot be. The evidence in the present case leaves it uncertain whether, if a fog horn had been blown on the bark, it would have not been heard sooner than the bell was heard, and thus earlier warning given to the steamer to have enabled her to keep out of the way". Finally, in further discussion of the facts of the case, it found that on the basis of the evidence presented to the Court, the presumption that arose when it was ascertained that the bark had given the wrong signal could not be rebutted in the case. It was on this basis that a division of damages was ordered.

Now, presumption is defined by American Jurisprudence as:

> "A rule of law that attaches definite probative value to specific facts or draws a particular inference as to the existence of one fact, not actually known, arising from its unusual connection with other particular facts which are known or proved." (20 Am. Jur. 161-.

Wigmore employs this language (Vol. IX, 3rd., p. 288):

> "Presumption. . . . is a rule . . . attaching to one evidentiary fact certain *procedural consequences* as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it."

Wigmore goes on to point out that the peculiar effect of a

presumption is merely to invoke a rule of law compelling the jury to reach a conclusion *in the absence of evidence to the contrary from the opponent*. If the opponent does offer evidences to the contrary, the presumption disappears as a rule of law and the case is in the jury's hands free from any rule. "Presumption," said the Oklahoma Court in *Stumpf v. Montgomery*, 101 Okla. 257, 226 Pac. 65, "may be looked on as the bats of the law, flitting in the twilight to disappear in the sunshine of actual facts." As noted in American Jurisprudence (Vol. 20, p. 163) "Where facts appear, presumptions recede."

And it should not be forgotten that there is no such thing as a "conclusive presumption". "Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case." (Wigmore, Vol. IX, p. 292).

While this Court has on occasion reaffirmed the rule, it is interesting to note that the latest expression of approval dates back nearly fifty years,[11] and an observation made by Justice Holmes in 1922 indicates that he did not attach the significance to the rule that has been given to it in this very case.[12]

At the peril of digressing, it must be noted that while in all tort cases violation of a safety statute gives rise to a presumption of negligence, it is necessary for one seeking to prevail because of the statutory violation, to prove that it caused or contributed to the resulting damage. Violation of a safety statute must meet the test of proximate cause as well as all

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[11]Lie v. San Francsico & Portland SS Co., 243 U.S. 291, 61 L. Ed. 395, 37 S. Ct. 270 (1917).

[12]White Ooak Transp. Co. v. Boston, Cape Cod & N. Y. Canal Co., 258 U.S. 341, 42 S. Ct. 338, 66 L. Ed. 649 (1922).

other delicts. Even in the instance of *res ipsa loquitur* it must be established that the negligent act presumed was the proximate cause. Nowhere else in the law of torts besides admiralty is it necessary to go further than to prove that an alleged delict was or was not the proximate or a contributing cause of resulting damage. To defend against the penalty of a statutory violation one must only establish the delict was not a proximate or contributing cause. This, of course, must be established with a degree of certainty comparable to the proof of all other facts determinative of proximate cause. But not so in Admiralty! Here one must go further and prove that the alleged statutory violation could not "*with reasonable possibility*" have been a factor in the matter. It is to be remembered that at this point in the case it will have already been established that the delict *was* not a factor; therefore, what is really being done is to wander into a never-never land of unreality to determine if the delict *might* have been factor. The unreality of the Rule has resulted in its being universally claimed "harsh".[13]

The Petitioner, however, was not satisfied in requiring the Respondent to meet the burden of the Pennsylvania Rule. The Petitioner, on page 23 of its Petition ascribes to the Pennsylvania Rule the standard of proof required in criminal cases: ". . . . the statutory violator shall establish by evidence, beyond a reasonable doubt, that the violation could not possibly have contributed to the accident," We urge that this is not the law, and that such a requirement has never been exacted under the Pennsylvania Rule by this or any Court of Appeal in Admiralty cases.

This Court has not had occasion to consider the Pennsyl-

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[13]The Ninth Circuit in a recent case described the Pennsylvania Rule as a "drastic and unusual presumption" (Pacific Tow Boat Co. v. States Marine, 276 F. 2d 745, 749, 9 C.A. 1960).

vania Rule since 1922 in the case of *White Oak Transp. Co. v. Boston ,Cape Cod and N. Y. Canal Co.*, supra, note 12. Neither of the lower courts in that case had mentioned the Pennsylvania Rule, and Justice Holmes mentioned it only to dispose of it on the ground that the fact findings below did not require the application of its penalties. Exactly the same disposition of it has been made by the Fourth Circuit in the instant case.

All of the Circuits which handle admiralty litigation have similarly held that the exaction of the penalty under the Pennsylvania Rule depends upon the fact finders' determination, within the framework of that rule, as to whether or not the statutory infringement in question could, with reasonable possibility, cause or contribute to the accident and damage.

In *Lia* (*Seaboard Tug and Barge, Inc. v. Rederi AB/DISA*, 1 C.A. 1954, 213 F. 2d 772, 1954 A.M.C.) the First Circuit clearly indicated that the inquiry as to whether or not a statutory violation could, with reasonable probability have contributed to an accident and damage was a question to be determined by the fact finder:

> "We cannot believe that the Supreme Court in *The Pennsylvania* intended to establish as a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote. Indeed, our interpretation seems to be supported by the decision in *The Umbria*, 166 U. S. 404 (1897) (and we do not see anything in *Lie vs. San Francisco & Portland S. S. Co.*, 243 U. S. 291 (1917, that militates against it) Notwithstanding the dictum in *The Martello*, 153 U. S. 64 75 (1894), that the offending ship has the burden of showing that its statutory fault "could not by any pos-

sibility have contributed" to the collision, we nevertheless feel that in applying the Rule of the Pennsylvania we are limited to the reasonable probabilities." *The Mabel*, 1929 A.M.C. 1688, 35 F. (2d) 731, 732 (2 CA, 1929). And even assuming that a danger signal by the *Lia* a minute earlier than the one she gave could have told the master of the *Seaboard* anything with respect to the danger he was in from the vessel he clearly saw approaching and had signaled to, still it must be evident from the proximity of the vessels and the slow speed and lack of maneuverability of the tug-barge unit that the extra minute in all reasonable probability could not, as the District Court found, have given time for the latter to escape from the dangerous position in which it had placed itself."

Certiorari was not sought in this case.

The Second Circuit, in *Nashbulk - Rutgers Victory*, (*National Bulk Carriers v. United States*, 2 C.A. 1950, 183 F. 2d 405, 1950 A.M.C. 1943) made a similar determination with respect to the conclusions of the fact finder and invocation of the Pennsylvania Rule:

"We are, however, inclined to accept the view that where, as here, the unsignalled change of course could not have been a contributing cause of the collision, the fault in failing to give the signal required by Article 18, 33 U.S.C.A. Sec. 103, cannot be held a contributing cause. In other words the Nashbulk, not being required by statute to warn the Rutgers Victory of her presence nor so required by the dictates of prudent navigation since she could take it for granted that her presence was known, was under an obligation imposed by Article 18 only to indicate her change of course to give timely notice of that. She has discharged her burden under the rule of The Pennsylvania, supra, co-extensive with her obligation un-

der Article 18. She cannot therefore be forced to pay half the damages merely because the other vessel was so grievously at fault that she needed, and might have put to good and effective use, an alerting signal which the rule did not require. Indeed, to allow that would simply put a premium upon gross negligence in navigation, for had the Rutgers Victory not been 'as blind as one who will not see' no alerting signal would have been of any use and the exoneration of the Nashbulk would have followed almost as a matter of course."

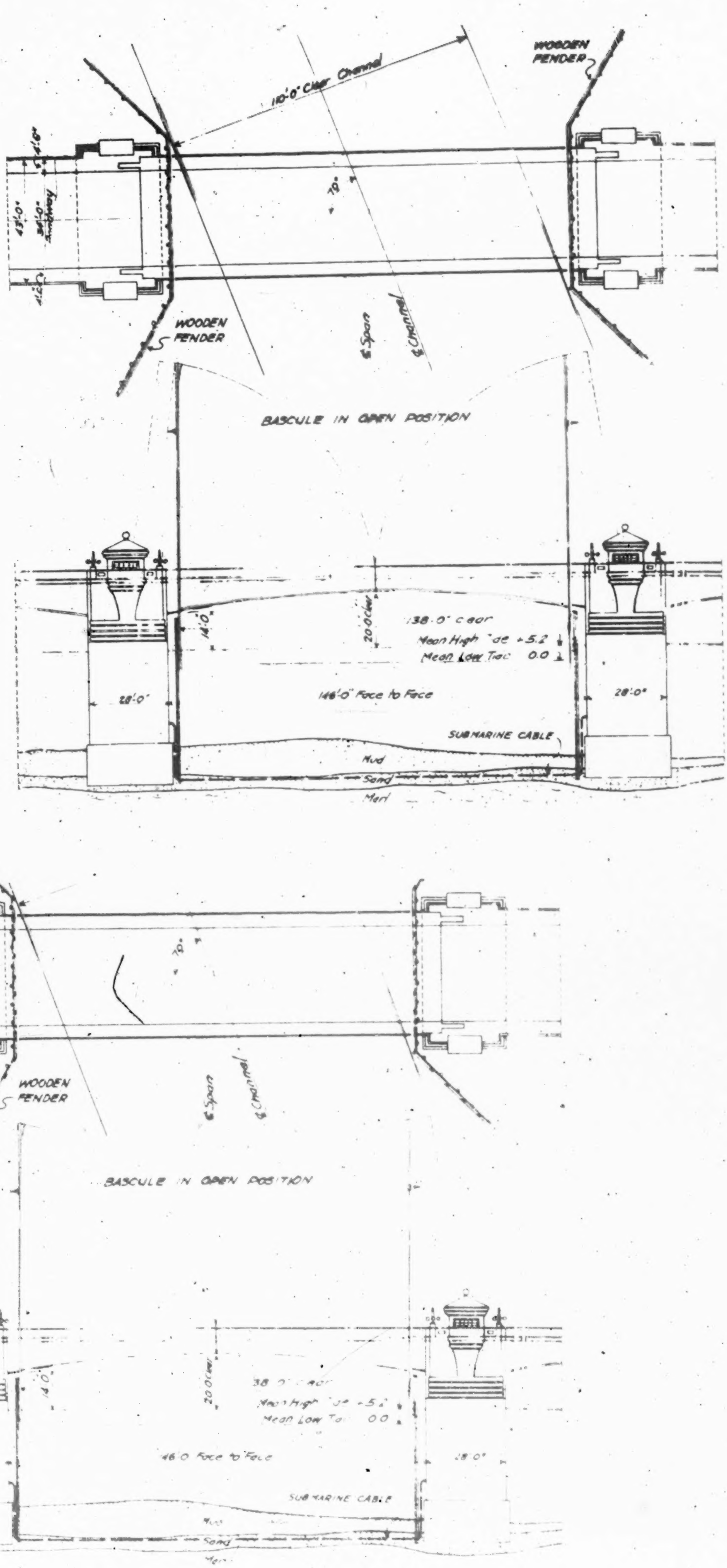
This Court denied certiorari. 340 U.S. 865, 95 L.Ed. 631, 71 S.Ct. 89.

The Second Circuit again in 1952 made a similar holding in a per curiam opinion in the case of *William J. Riddle* (*United States v. United States Lines Co.*, 2 C.A. 1952, 200 F. 2d 608, 1953 A.M.C. 132):

"The only possible doubt is whether the American Farmer's statutory fault in failing to signal when she turned five degrees to her right is enough to fasten contributory fault upon her. Judge Kaufman found that it could not have contributed to the collision. We think he was right. See National Bulk Carriers v. United States, 2 Cir., 183 F. 2d 405, 409, certiorari denied Burns S. C. Co. vs. National Bulk Carriers, 340 U.S. 865. 71 S. Ct. 89, 95 L. Ed. 681. The decree is affirmed on the opinion below."

Certiorari was not sought in this case.

The Second Circuit again in 1955 refused to apply the Pennsylvania Rule blindly, because the facts did not justify such application. In S.S. *Shell Bar* (*Automobile Insurance Co. v. United Fruit Co.*, 2 C.A. 1955, 224 F. 2d 72, 1955 A.M.C. 1429) that Court stated that it was unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute for



ENLARGED PLAN AND ELEVATION OF MOVABLE SPAN

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proof of cause and that in any event, in the situation involve in that case, ". . . libellants can have no recourse to the doctri of statutory fault because there is lack of evidence here th any statutory fault was the proximate cause of the fire". Ce tiorari was denied in this case. 350 U.S. 885, 100 L. Ed. 7 76 S. Ct. 138.

The Second Circuit again in 1958 deferred to factual find ing in refusing to apply the sanctions of the Pennsylvania Rul In *Russel. Poling No. 29 - Corporal (Russel, Poling & Com pany v. Conners Standard Marine Corp.*, 2 C.A. 1958, 252 F 2d 167, 1958 A.M.C. 1093) the failure to provide a statuto lookout was held on the facts to have no connection with th accident:

> "In the case at bar, the pilot of the tug stated that n lookout was needed. Clearly, there was no showing tha if there had been a lookout, the accident would have bee in any way prevented."

Certiorari was not sought here.

The Third Circuit, although not mentioning the Pennsylvani Rule specifically, has arrived at the same result in applyin or not applying the penalties of statutory violation, dependin on the facts proved and found. In *Mohawk - Hartford (D Dougherty Co. v. United States*, 3 C.A. 1952, 207 F.2d 62 1953 A.M. 1541) that Court held, in a divided opinion:

> "It is the general long-established rule in collision case that:
>
> 'Where fault on the part of one vessel is established b uncontradicted testimony, and such fault is, of itsel sufficient to account for the disaster, it is not enoug for such vessel to raise a doubt with regard to the man agement of the other vessel.'

(Citing cases).

In applying the rule stated, it has frequently been held that even a prior act of negligence does not 'contribute' if it merely creates a 'condition' which makes it possible for the subsequent negligence of the other vessel to bring about a collision. Under the cases the earlier fault is held to be merely a 'condition' and not a 'cause' of the collision . . . . the fault of the vessel sought to be charged must be a 'cause' and not a 'condition' of the collision and the position of a vessel in navigation though 'unlawful' and a 'maritime fault' does not in and of itself make her liable and in order to be held, her position must be the 'cause' of the accident and not merely a 'condition' with respect to it.

In accordance with the principles stated the Courts have time and again absolved from liability vessels which had transgressed statutes requiring their navigating in mid-channel or mid-stream or had executed 'unjustifiable' maneuvers where the facts demonstrated that their conduct was merely a 'condition' and not a 'cause' of an ensuing collision."

Certiorari was denied by this Court. 347 U.S. 912, 98 L. Ed. 1068. 74 S. Ct. 476

The Fourth Circuit. where this litigation arises, in *Dixie B - Dewey*, (*Webb v. Davis*, 4 C.A. 1956, 236 F. 2d 90, 1956 A.M.C. 1789) in an opinion by Judge Soper stated:

"The requirements of The Pennsylvania rule must be strictly enforced for the safety of navigation, but it should not be pressed to such an extreme as to justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated."

(Citing cases).

Certiorari was not sought.

The Fifth Circuit has made similar determinations and reversed the District Court in *Star of Honduras - Queenston Heights*, (*Compania de Maderas de Caibarien, S. A. v. The Queenston Heights*, 5 C. A. 1955, 220 F.2d 120, 1955 A.M.C. 797). Circuit Judge Holmes, in his opinion for the Court, found that the failure to have a lookout on one vessel did not actively contribute to the cause of the collision, and held that the contrary finding by the District Court was clearly erroneous. The opinion points out that speculation would be necessary in order to connect the statutory violation with the collision and announces agreement with the First Circuit in the language hereinabove quoted from *Lia - Seaboard Tug & Barge* to the effect that the Pennsylvania Rule was not intended to burden every statutory violator with establishing that its fault could not by any stretch of the imagination have any causal relation to the collision, no mattter how speculative, improbable or remote. Certiorari was denied. 350 U.S. 824, 100 L.Ed. 736, 76 S.Ct. 52.

The Fifth Circuit again in 1955 reversed a District Judge for erroneously applying the "harsh" Rule of the Pennsylvania. In *Ruby O - Fella C*, (*Koch-Ellis Marine Contractors v. Chemical Barge Lines*, 5 C.A. 1955, 224 F.2d 115, 1955 A.M.C. 356 Chief Judge Hutcheson and Judges Jones and Christenberry in a per curiam opinion, reiterated the views of that Court as set forth in *Queenston Heights*, supra. It appeared that the District Judge had applied the Pennsylvania Rule reluctantly under a feeling of compulsion to enforce it as he thought it applied, his reversal is based on the ground that the facts as found by him did not require application of the Pennsylvania Rule, so as to burden the offending vessel with establishing that its fault could not, by any stretch of the imagination

have any causal relation to the collision. No certiorari was sought in this case.

The Fifth Circuit in 1957 was again very outspoken on the question of the Pennsylvania Rule. In *Evelina - Edward T*, (*Green v. Crow*, 5 C.A. 1957, 243 F.2d 401, 1957 A.M.C. 726) Judge Jones, speaking for that Circuit, states the doctrine of the Pennsylvania case and goes on to say:

> "This is not a rule of liability. It creates a shifting of the burden of proof as to causation. The Aakre, 2 Cir., 1941, 122 F. 2d 469, certiorari denied Waterman v. The Aakre, 314 U. S. 690, 62 S.Ct. 360, 86 L.Ed. 552. Where neither vessel has strictly complied with the statutory rules, and such is the case before us, we have said that
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> > 'All of these presumptions, in the final analysis, are mere aids to the court in getting at the right of the matter, and their relative weight must depend upon the circumstances of the particular case.' Coyle Lines v. United States, 5 Cir., 1952, 195 F.2d 737, 739.

Certiorari was not sought in this case.

The Ninth Circuit, like all the others handling admirality litigation, has deferred to fact finding in respect to the statutory fault rule. In *Crowley - Patrick*, (*Crowley Launch & Tugboat Co. v. Wilmington Transp. Co.*, 9 C.A. 1941, 117 F.2d 651, 1942 A.M.C. 449) the Tug Crowley sought to fasten absolute blame for the damages on the Patrick by charging her with failing to blow the required signals on putting her engines astern. The Ninth Circuit said:

> "... If this be fault it did not contribute to the collision in view of the abundant passing room. The three blast whistle is not a warning signal. That signal is four or more short blasts. Inland Rules, Art. 18, Rule III. A master cannot be charged with causatively contributing to a col-

lision by failing to blow the full astern signal when, in the circumstances, his reversing would not affect the navigation of an approaching vessel, because, if blown, might have operated as a warning signal to that vessel which, without his knowledge, was violating the Ariadne (lookout) rule."

No certiorari was sought.

The Ninth Circuit again in 1953 spoke on this subject in *Kiska-Mayrower*, (*Oaksmith v. Garner*, 9 C.A. 1953, 205 F.2d 262, 1953 A.M.C. 1021) Kiska contended that failure of Mayflower to give statutory whistle signals rendered her liable for half damages under the Pennsylvania Rule, and the Court said:

"Even assuming *arguendo* that the position of the vessels at any time during their respective and relevant movements brought the application of Rule V in operation, the failure of the Mayflower to give the 'bend' signal has satisfied the burden enunciated in The Pennsylvania, supra. The testimony of Captain Ellis shows that he had seen the Mayflower in time to avoid the collision if both had kept to their original courses, so that the failure of the Mayflower to give the 'bend' signal could not have been a contributing cause. The trial court found that the Kiska was the deviating vessel causing the disaster."

No certiroari was sought in this case.

In 1960, the Ninth Circuit, in *Pacific Tow Boat Co. v. States Marine*, supra (footnote 13), again said:

". . . The words 'could not have,' as used in this rule, do not require the vessel guilty of a statutory fault to prove that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable, or remote. Seaboard Tug

& Barge, Inc. v. Rederi, AB/DisA, 1 Cir., 213 F.2d 772, 775. But they do cast upon such vessel the burden of establishing that the violation could not reasonably be held to have been a proximate cause of the collision. States Steamship Co. v. Permanente Steamship Corp., supra. 231 F.2d at page 87."

Certiorari was not sought in this case.

Lastly, the Second Circuit in May of 1960 decided a case strikingly similar to the instant case. In *Tidewater Pipe Co. v. Dredge Crest*, 2 C.A. 1960, 278 F.2d 489, 1960 A.M.C. 1419, District Judge Walsh's finding of fact, that a variation of two feet in the depth prescribed for a pipe line by an Army Engineer's permit did not contribute to the damage caused to the pipe line by the Dredge's digging mechanism, was affirmed. As in the instant case, apparently, the Pennsylvania Rule was not called to the attention of the Trial Court, and Judge Swan's opinion concludes as follows:

"The second error of law claims that the rule of *The Pennsylvania*, 86 U.S 125 (1874), should have been applied, since the permit required that appellee's pipeline be at a minimum depth within the channel of 42 feet below mean low water, and the court found that actually it was only 40 feet. The contention is without merit. Not only was the rule not called to the court's attention, but the variation from permit depth was proved not to have been a contributing cause of the pick-up of the pipeline outside the channel."

Private correspondence with the successful advocates in this case indicates that the losing party did not seek certiorari.

(2) THE APPLICATION OF THE PENNSYLVANIA RULE IN THE INSTANT CASE.

In obedience to the directive of the Court of Appeals which

ordered it to "make a specific finding in the light of the Pennsylvania Rule," the District Court undertook to determine whether the failure of the Respondent to raise the bascule to a required 80° angle "could have reasonably caused or contributed to the collision and the resulting damage." The District Court found as facts:[14]

> "The first blow of the hull of the FORT FETTERMAN against the gear rack and girder in question effectively destroyed the bridge and inevitably produced the damage thereto.
>
> The gear rack moves in a constant arc and beyond a bridge elevation of about 50° would have presented the same amount of protrusion at any bascule elevation up to the limits of opening; had the bridge been elevated to 80° or 82° at the time of this accident, instead of 71° as it was, the amount of gear rack protrusion would have been the same, but the impact of the vessel would have been against a different section of the gear rack, about a foot or so below the actual point of contact. Thus at 80° or 82° elevation, the blow of the ship would have struck a portion of the gear rack further away from the cross-frame or stiffener which joins the downstream girder to the upstream girder at the point of the live-load shoe. The resistance of the girder and gear rack to torsion and horizontally-applied force progressively decreases as the distance from this cross-frame or stiffener increases, and, therefore, the likelihood of collapse of the bridge would be greater at the higher elevation. In any event, the fact that the bridge was elevated to 71° instead of 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or to the damages resulting therefrom. These damages would

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[14] Appellant's Appendix in No. 8023, page 16, paragraphs 4 and 5

have been sustained whether the bridge had been elevated 61', 71', 80', or 82'."

In so doing, the District Court did not make inquiry as to whether, had the FORT FETTERMAN made a different and perhaps parallel approach, a collision would have resulted from the 71° angle of the bascule, nor did it undertake to try to find what might have happened had the approach been on a different day and under different conditions of wind and tide. It considered the failure of the Respondent to raise the bascule to 80° together with all the rest of the evidence in the case and on that basis determined if the Respondent had, with reasonable possibility, overcome the presumption that the lower elevation did or could have caused or contributed to the collision and resulting damage. This is obviously the correct way to treat the matter unless the Pennsylvania Rule is going to be converted from a rule of evidentiary presumption to a rule of absolute liability, in which event it would be only necessary in any case to establish that a statutory fault existed. The discussion of the Rule itself shows that such was never intended. Therefore, so long as it continues to exist as a Rule, it must be applied to the determined facts of the particular case at bar, and not to an ideal situation, conjured up by the litigant claiming the benefits of the Rule wherein his conduct is fault-free and the only fault considered is that of the statutory violator. The limited speculation required by the Rule must not be enlarged lest Courts of Admiralty become crystal-ball gazers instead of finders of facts.

(3) PROOF SUPPORTING THE FINDINGS THAT THE RESPONDENT BRIDGE HAS MET AND OVERCOME THE BURDEN AND PRESUMPTIONS OF THE PENNSYLVANIA RULE IN THIS CASE.

On the second trial, a conflict in the testimony resulted from the attempt on the part of the Petitioner to prove and

the Respondent to disprove the fact that the angle of elevation could have, with reasonable possibility, caused or contributed to the destruction of the bascule. State Highway Bridge Engineer Gooding, and Respondent's experts Barstow and McCrady, each testified that in their opinion there was no reasonable possibility that the destruction of the bascule which occurred at the angle of 71° would not have occurred had the bridge elevated to an angle of 80° or 82°. The Petitioner's witnesses, Grushky and Collard, were of different opinions. To sustain the prevailing theory the Respondent's witnesses pointed out that had the bridge been raised to a higher angle, the point of contact on the gear rack would have been at a position which would have offered less resistance to the FORT FETT. RMAN than at the point of the gear rack at which the contact actually occurred. At an angle of elevation of 80° the impact would have been a foot or more further away from and below the cross-frame or stiffener running between the two bascule girders at the position of the live-load shoes. (See *Annex B*) These witnesses testified that the resistance of the raised girder to torsion or horizontal force becomes progressively less as the distance from the cross-frame or stiffener increases, and it was their opinion that the likelihood of the blow causing the collapse of the bridge at 80° or 82° would be greater than at 71°. It should not be overlooked that the witness Barstow had expert knowledge of the Strauss bascule and had participated in the design of this very bridge. While the witnesses Grushky and Collard had different opinions from those expressed by the Respondent's witnesses, the District Court resolved the matter on the basis of credibility. He stated: "Here again the question is one of credibility. My decision for the Libellant is based on the clear and convincing reasoning of the witnesses."

If the Pennsylvania Rule is to continue to exist as a rule of evidentiary presumption imposing upon the party guilty

of statutory fault the burden of going beyond proof that the statutory fault did not contribute to the accident and showing that the statutory fault could not, with reasonable possibility, contribute to the result, then one has to resort to supposition to meet this extraordinary burden. But the inquiry is limited to the factual question of what might have reasonalby ocurred under the circumstances of the case, and on remand the Respondent did not have to prove once again that a collision took place and that the particular point of contact was the gear rack. Those facts had been resolved. Consequently, the only inquiry to be made was what might reasonably have happened had the bascule arm been raised to 80° or 82°. We submit that in the record here the Respondent has met this unusual burden with clear and convincing proof.

III. CONCLUSION

All told, this case has consumed some three weeks at the trial level and there have been four appellate arguments on the merits. The Trial Judge, of course, heard and saw every witness except the few whose depositions were used, and was therefore in position to judge their credibility. Respondent's presentation of the actual occurrence of the collision was made by disinterested witnesses, some of whom were motorists held up on the bridge when the draw opened, and some of whom were sea-going Navy personnel on moored Navy vessels or ashore at the nearby Naval Minecraft Base. Petitioner's witnesses as to the occurrence of the collision, however, were drawn from those in charge of and responsible for the management of the FORT FETTERMAN; Petitioner did not produce a single eyewitness from the numerous persons on the bridge nor from the Navy Minecraft installation.

These observations are made for the purpose of emphasizing that this case, like all collision cases, should be and has

been decided on the basis of the facts surrounding the collision which have been accepted by the trier of those facts. Presumptions play a part in some collision cases, true, but these too must be tested against the crucible of facts, and if the accepted facts overcome the presumptions, presumptions must go out of the case.

Early in the litigation, Respondent lost the benefit of the valuable presumption of negligence against a moving vessel which collides with a stationary bridge; this loss resulted from the *fact* that the stationary bridge was in partial violation of its War Department permit (failure to elevate to 80') and therefore was not entitled to the benefit of this presumption.

Similarly, *facts* developed in the litigation now deprive Petitioner of the benefits initially claimed under the presumption of the Pennsylvania Rule. Facts accepted by the Trial Court and affirmed by the Appellate Court below find ample support in the record in the form of credible evidence, and these facts dispel and dissipate any presumptions arising from alleged statutory violations: (a) The FORT FETTERMAN was negligently managed on her approach to and transit of the bridge; (b) the bridge was opened and ready for the passage of the FORT FETTERMAN in ample time and there was no violation of the statutory requirement of timely opening; (c) the gear rack's position did not violate the permit and the blow of the FORT FETTERMAN against it is what effectively destroyed the bridge; (d) the fender system provided was adequate for its intended use; (e) failure to elevate the bascule to 80° or 82° could not with any reasonable possibility have caused or contributed to the collision or damages *in this accident* because these damages would have been sustained even if the elevation had been to 80° or 82° as required by the permit.

Respondent respectfully submits that the Petition for Certiorari should be denied because this matter involves no special or important reasons for review by this Court:

(1) The decision below by the Fourth Circuit is in no conflict with decisions in other Courts of Appeals; on the contrary, it is in accord with all the other Admiralty Circuits in that facts govern the application or non-application of the severe sanction of the Pennsylvania Rule.

(2) No important question of federal law is here involved. This is no more nor less than another collision case that has been thoroughly examined below.

(3) The decision below is in no way conflicting with applicable decisions of this Court; it is in accord with *White Oak Transp. Co. v. Cape Cod*, etc., supra.

(4) There has been no departure from the accepted and usual course of judicial proceedings; as noted, this is simply another collision case which has been examined and re-examined below.

Respectfully submitted,

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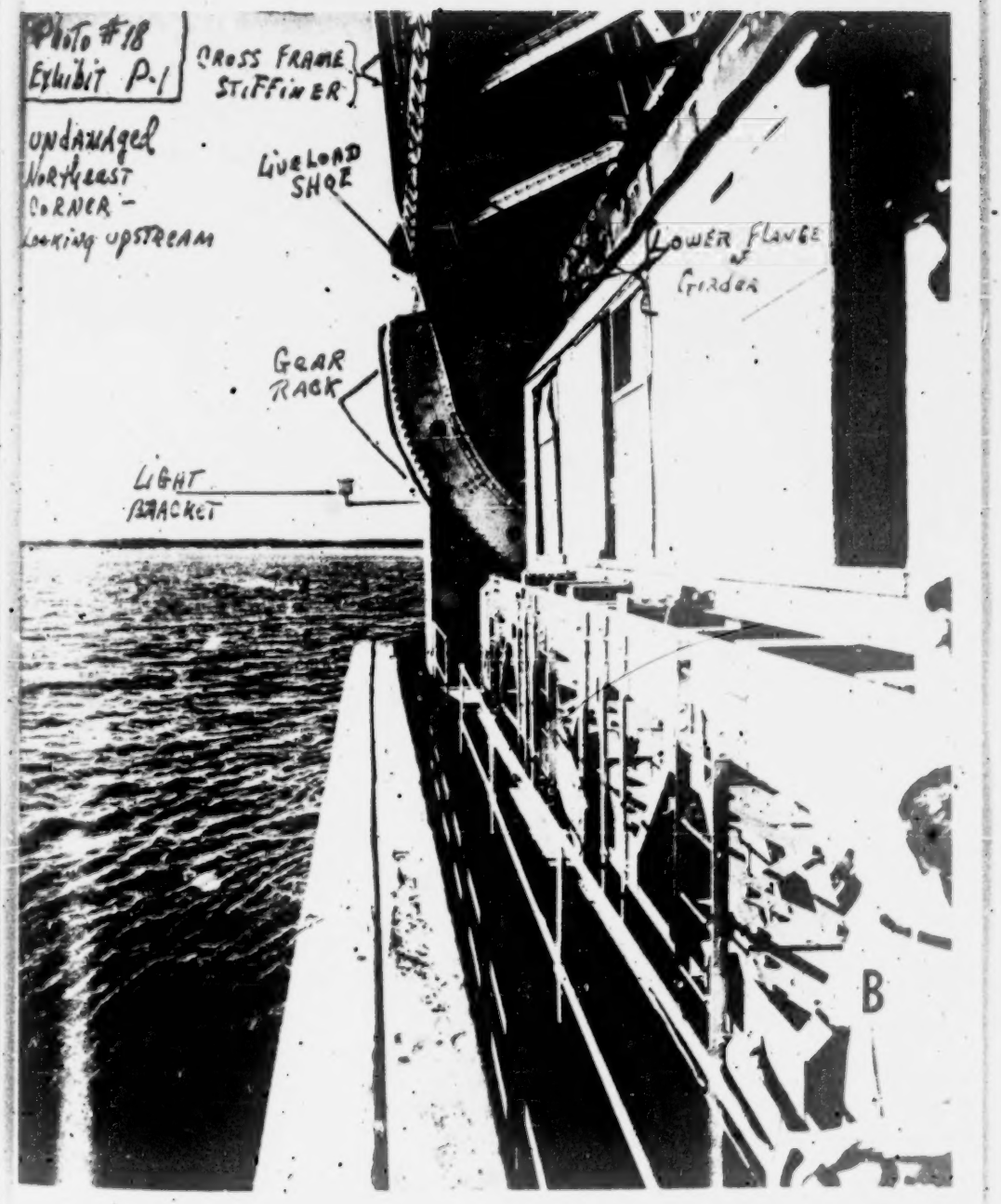
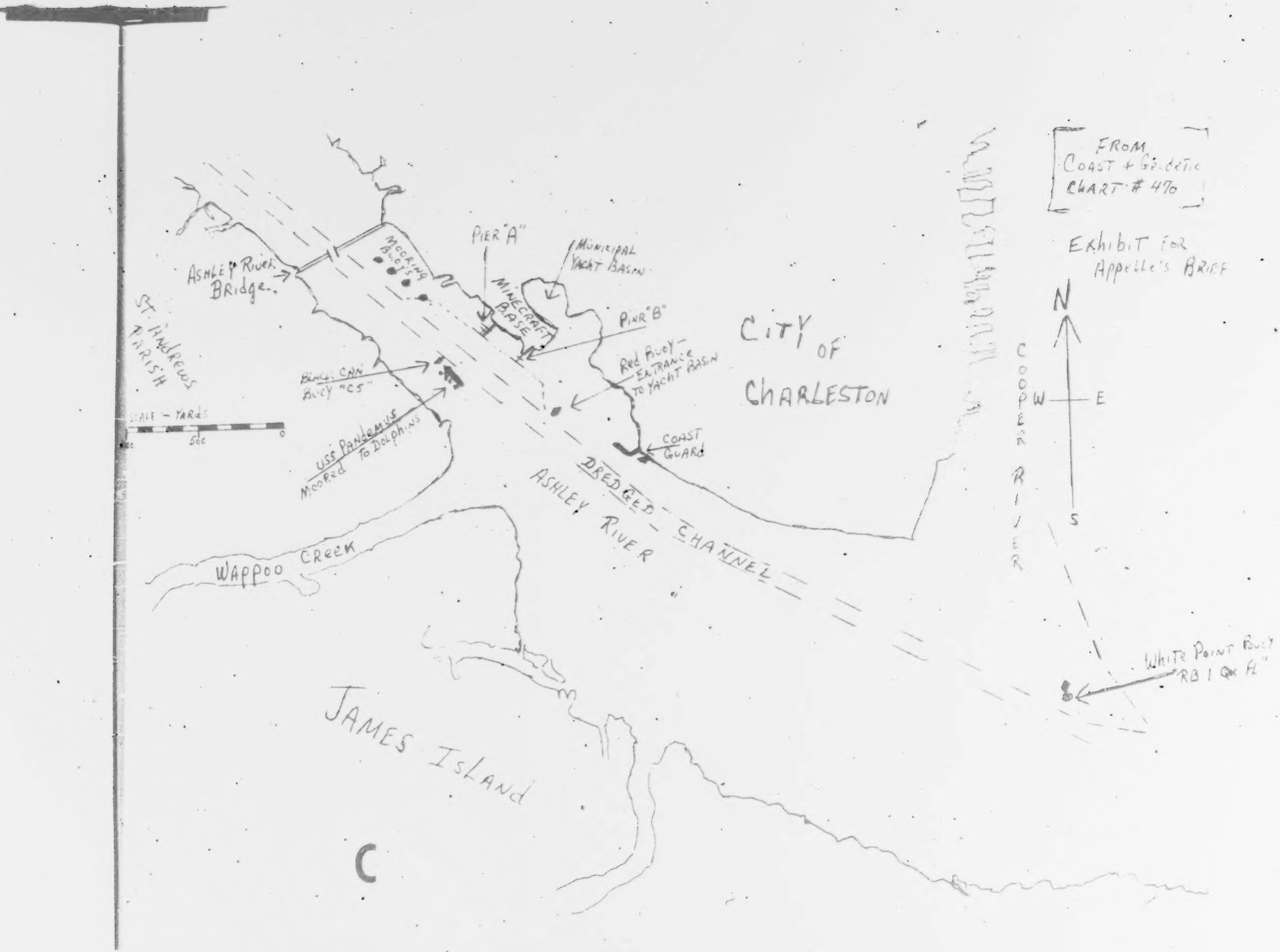


Photo #18
Exhibit P-1
undamaged
Northeast
corner -
looking upstream
CROSS FRAME STIFFINER
LIVE LOAD SHOE
LOWER FLANGE of GIRDER
GEAR RACK
LIGHT BRACKET
B


FROM
COAST & GEODETIC
CHART # 470
EXHIBIT FOR
APPELLE'S BRIEF
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CITY OF CHARLESTON
ASHLEY RIVER
ASHLEY RIVER BRIDGE
ST. ANDREWS PARISH
MOORING BUOYS
PIER "A"
MUNICIPAL YACHT BASIN
MINECRAFT BASE
PIER "B"
RED BUOY — ENTRANCE TO YACHT BASIN
BLACK CAN BUOY "C5"
USS PANTEMUS MOORED TO DOLPHINS
COAST GUARD
DREDGED CHANNEL
WHITE POINT BUOY "RB 1 QK FL"
WAPPOO CREEK
JAMES ISLAND
SCALE — YARDS
500
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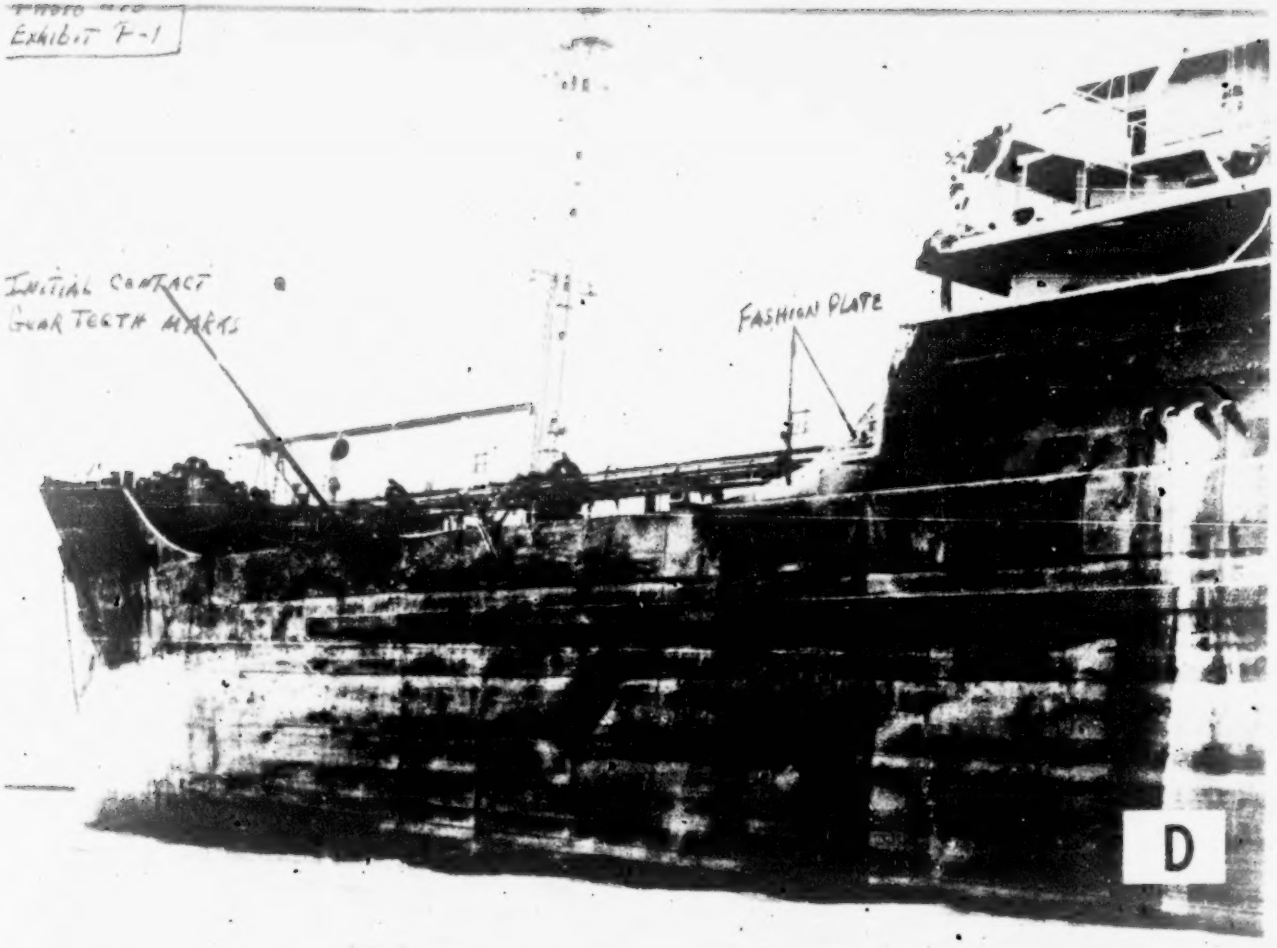
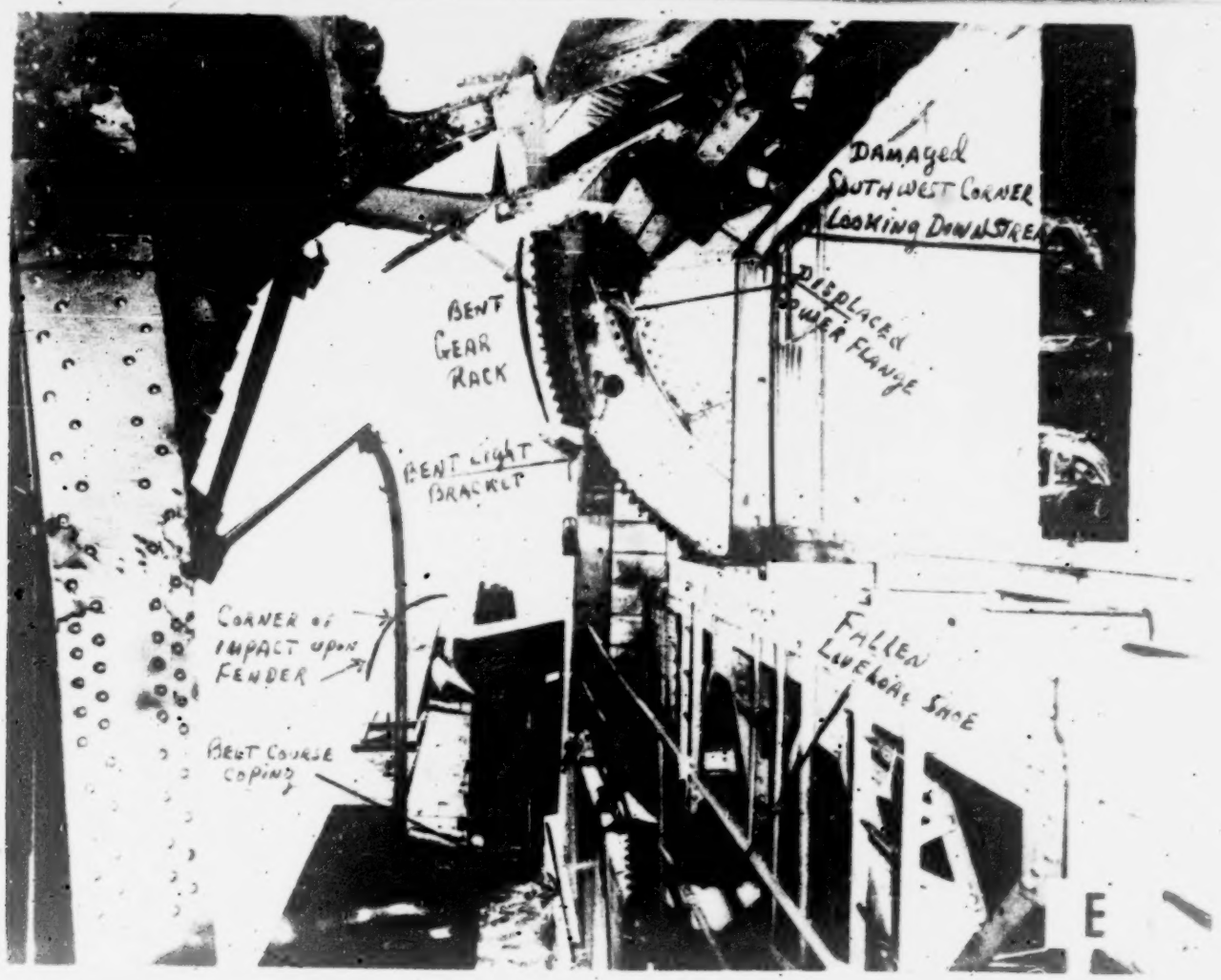
PHOTO NO.
EXHIBIT F-1




DAMAGED
SOUTH WEST CORNER
LOOKING DOWNSTREAM
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BENT
GEAR
RACK
BENT LIGHT
BRACKET
CORNER OF
IMPACT UPON
FENDER
FALLEN
LOOSE LOAD SHOE
BENT COURSE
COPING
E